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MICHAEL ROBAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-781

FRITZ SCHERK,

Petitioner,

v.

ALBERTO-CULVER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit are reported officially at 484 F.2d 611, and unofficially at [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,092, and are printed at pages App. 1 to App. 17 of the petition for certiorari. The opinion of the United States District Court for the Northern District of Illinois, Eastern

Division, is not reported either officially or unofficially. It is printed at pages App. 18 to App. 33 of the petition for certiorari.

JURISDICTION

The Seventh Circuit's judgment was entered on August 2, 1973. Petitioner's petition for rehearing in the Seventh Circuit, filed on August 16, 1973, was denied on October 18, 1973. The petition for a writ of certiorari was filed on November 15, 1973. Certiorari was granted on January 21, 1974. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

STATUTES AND CONVENTION INVOLVED

The statutes involved herein are the Federal Arbitration Act, 9 U.S.C. §§1, 2, 3, 201, 202, 206 and 208 (1970), and Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a) (1970), 48 Stat. 903. The convention involved herein is the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, September 30, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. The texts of these statutory provisions and the convention are reproduced in the Addendum to this brief.

QUESTION PRESENTED

Whether unambiguous contractual provisions requiring arbitration of an international commercial dispute, which provisions are the result of arm's-length bargaining by sophisticated businessmen and lawyers, are unenforceable merely because a claim, as yet not proven, has been made that the Securities Exchange Act of 1934 has been violated.

STATEMENT OF THE CASE

Respondent Alberto-Culver Company brought this action charging that the petitioner, Mr. Scherk, breached certain contractual warranties and violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j(b), Rule 10b-5 promulgated pursuant thereto, and common law. (A. 3-14.) Jurisdiction of the District Court was predicated upon Section 27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1332. (A. 3, 11.)

Alberto-Culver is a Delaware corporation with its principal place of business in Melrose Park, Illinois. (A. 11.) Alberto-Culver manufactures and distributes toiletries and hair products in national and international markets. (A. 48, 58.) Mr. Scherk is a German citizen, residing in Switzerland. (A. 30.) Prior to selling his businesses to Alberto-Culver, Mr. Scherk lived in Berlin, West Germany and was engaged in the business of manufacturing and selling cosmetics in Europe. (A. 30, 48.) Mr. Scherk owned three European businesses: Firma Ludwig Scherk ("FLS"), a German sole proprietorship, located in Berlin, which manufactured cosmetics; Scherk Establissement Vaduz ("SEV"), a Liechtenstein business entity with no counterpart in American law, which was located in Liechtenstein and which licensed trademarks for cosmetics on an international basis; and Lodeva Herstellung und Vertrieb Kosmetischer Artikel Gmbh ("Lodeva"), a dormant German business entity with no counterpart in American law. (A. 3-4, 32, 48-49, 91.) Mr. Scherk does not own any property, has no residence and transacts no business in the United States. (A. 30.)

Alberto-Culver was interested in gaining an entree into the European market for its products and contacted Mr.

Scherk in Berlin in June of 1967 with a view toward acquiring Mr. Scherk's European cosmetic businesses. Negotiations were initiated and included a visit to Mr. Scherk in Berlin in November, 1967, by Mr. Fred Maeding, an Alberto-Culver representative. In December, 1967, Mr. Benjamin Navon, representing Mr. Scherk, met with Mr. Leonard H. Lavin, Alberto-Culver's president, in Chicago. An impasse was reached and negotiations terminated. (A. 30, 49-50, 90.)

In February, 1968, Alberto-Culver again contacted Mr. Scherk in Berlin and requested a resumption of negotiations. Negotiations resumed. (A. 30.) In March, 1968, Mr. Lavin met with Mr. Scherk in Berlin and the basic terms of the sale of the three businesses were established. (A. 83-84.) After the March meeting, difficulties arose as to the interpretation of the basic price and payment terms of the March agreement. Mr. James Nadler, an Alberto-Culver representative, tried unsuccessfully to settle the differences at meetings held in London and Berlin. (A. 84.) Finally, in May, 1968, at a meeting in Melrose Park, attended by Mr. Scherk, Mr. Lavin and others, the differences were resolved. (A. 31, 85-86.)

Subsequently, lawyers for the parties drafted definitive written contracts.*, (A. 31.) Alberto-Culver engaged two American law firms to work on this matter, the firm of Bell, Boyd, Lloyd, Haddad & Burns and the firm of Pattishall, McAuliffe and Hofstetter (A. 38-39), as well as, two European lawyers, Mr. Karlheinz Quack of Berlin (A. 52-53, 88) and Mr. Töndury of the Liechtenstein law firm of Präsidial Anstalt Vaduz (A. 87). An extensive investiga-

* The SEV contract is a 74-page document with a 13-page Annex and exhibits. The FLS contract is a 55-page document plus exhibits. (Exhibits 1 and 3 to Complaint, Record Document No. 2.)

tion and examination of the Scherk businesses was undertaken in Europe by and for Alberto-Culver. The books of the businesses were thoroughly examined by Peat, Marwick & Mitchell. Experts in West Germany, Austria, Great Britain and Liechtenstein were consulted with respect to the trademarks* and the value of the goodwill of the businesses. (A. 31, 32, 86-89.)

Finally, the contracts were completed and Mr. Scherk signed them in Vienna, Austria, in February, 1969. (A. 31.) The formal closing took place in Geneva, Switzerland, in June, 1969, when Alberto-Culver, represented by Mr. Walter Treumann (an attorney) and Mr. Nadler, delivered Alberto-Culver's payment — cash and four promissory notes**—to Mr. Scherk. (A. 31, 87.) Alberto-Culver acquired the assets of FLS and all of Mr. Scherk's interest in Lodeva. As to SEV, Alberto-Culver specified which assets it was buying, but for tax purposes required that the acquisition take place as a sale of stock. (A. 91-92.) Therefore, SEV was transformed into a stock company by Alberto-Culver's Liechtenstein lawyers acting as escrow agents. (A. 87-88, 92.)

In the FLS and SEV contracts, Alberto-Culver and Mr. Scherk agreed that any and all disputes arising con-

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*SEV and FLS owned some 275 trademarks effective in 10 European countries. One hundred and thirty were filed in Geneva, Switzerland, pursuant to the Treaty of Madrid for effect in various European countries. None of the FLS or SEV owned trademarks were registered or effective in the United States. (A. 33.)

**The promissory notes provide for payments to be made to Mr. Scherk in Geneva, Switzerland. The one negotiable note may not be negotiated without prior approval by Alberto-Culver and is restricted as to whom it may be sold or transferred. The other three notes are by their terms non-negotiable and must be surrendered to Alberto-Culver. (A. 62-68.)

cerning the transactions were to be arbitrated before the International Chamber of Commerce ("ICC") in Paris, France. (A. 19-20.)

In 1970, Alberto-Culver concluded that Mr. Scherk had breached his contractual warranties as to the trademarks owned by FLS and SEV. Instead of instituting arbitration as required by the contracts, Alberto-Culver brought suit in the United States District Court for the Northern District of Illinois, Eastern Division in June, 1971. Mr. Scherk moved in the District Court, pursaunt to 9 U.S.C. §3, for an order staying these proceedings pending arbitration (A. 27-29)*, and he instituted arbitration before the ICC in Paris on November 9, 1971. (A. 70.) On November 24, 1971, on the motion of Alberto-Culver (A. 69-72), the District Court enjoined Mr. Scherk from proceeding with arbitration before the ICC. (A. 81-83.) On December 22, 1971, the District Court denied Mr. Scherk's requested stay (A. 93), and on January 14, 1972, the Court again enjoined Mr. Scherk from proceeding with arbitration before the ICC. (A. 98-100.) Mr. Scherk appealed these orders. (A. 101-02.) The Seventh Circuit affirmed, Judge Stevens dissenting. (A. 102-03.)

SUMMARY OF ARGUMENT

At issue in this case is whether arbitration agreements, which are part of an international commercial transaction, are unenforceable merely because a claim is made that the Securities Exchange Act of 1934 has been violated.

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* Mr. Scherk also moved to dismiss the suit, *inter alia*, for lack of subject matter jurisdiction, for lack of personal jurisdiction and on the grounds of forum non conveniens. (A. 27-29.) The District Court denied the motion to dismiss. (A. 93.)

Alberto-Culver, an American corporation, was interested in gaining an entree into the European market and, to that end, it acquired the three European cosmetics businesses owned by Mr. Scherk. The acquisitions were consummated after several months of intensive investigation and negotiation. Each side had the assistance of its own lawyers, business consultants, accountants and other experts. The parties considered the possibility of future disputes and resolved that problem, fairly and intelligently, by agreeing to arbitrate any and all future disputes before the ICC in Paris. When a dispute actually arose, Alberto-Culver breached its agreement to arbitrate and instituted suit in the United States.

Were it not for this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), these arbitration agreements would have been enforced under the Federal Arbitration Act. 9 U.S.C. §§1-3. Indeed, in spite of *Wilko*, these agreements should have been enforced. In 1970, the United States acceded to the United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards. Chapter 2 of the Federal Arbitration Act, in part, was enacted to require the enforcement of arbitration agreements in international commercial transactions. 9 U.S.C. §201 *et seq.* This recent statement of Congressional policy supersedes *Wilko* and should have been effectuated in this case.

Even if taken out of their international context, these arbitration clauses are enforceable. *Wilko* does not require a holding that the arbitration clauses at issue are unenforceable. *Wilko* involved an investor's suit against a brokerage house. This Court held that in such a case, when claims were made under the Securities Act of 1933, agreements to arbitrate future disputes would not be en-

forced. In *Wilko,* the concern was largely that customers dealing with brokerage houses do so at a serious disadvantage. In that particular case, the customer was faced with a form contract waiving his rights in advance. In the instant case, the arbitration agreement is the result of arm's-length bargaining by sophisticated businessmen and lawyers for a specific, negotiated transaction in which each side had equal bargaining power.

When the international context of the present case is added, this case is clearly beyond the ambit of *Wilko.* As this Court recognized in *M/S Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972), the certainty which results from forum selection clauses in international commercial dealings is not merely useful, but *indispensable* to such transactions. A refusal to enforce forum selection clauses arrived at in negotiated transactions by sophisticated businessmen, merely because a securities claim is made, must adversely affect American foreign commerce. An application of *Wilko* to a case such as this will decimate the policy underlying *Zapata.* Businessmen would be deprived of the right to establish certainty in international transactions by agreeing in advance upon the forum (here arbitration) for future disputes. It serves no purpose to impose that result on sophisticated businessmen. Furthermore, applying *Wilko* to the arbitration agreements of this case would effectively nullify Chapter 2 of the Federal Arbitration Act. Such results are unwarranted, unwise and should be avoided. The arbitration agreements, at issue here, should be enforced. Alberto-Culver should be required to live up to its bargain.

ARGUMENT

I.

THE FEDERAL ARBITRATION ACT REQUIRES THAT THE DISPUTE BETWEEN THESE PARTIES BE ARBITRATED ACCORDING TO THE PARTIES' EXPLICIT AGREEMENTS.

Alberto-Culver, an American corporation, deciding that it wanted to acquire related businesses in Europe in order to gain an entree into the European market for its products, voluntarily chose to go to Germany and approach Mr. Scherk, a German citizen and resident,* seeking to acquire his European cosmetic businesses. (A. 30, 49, 90.) After protracted negotiations which took place on both sides of the Atlantic Ocean, Alberto-Culver finally acquired these businesses in 1969. During their negotiations, the parties carefully considered the difficulties of handling future problems in this international context. The result was a reasonable, deliberate choice to arbitrate any and all disputes arising from the transactions before the ICC in Paris. (A. 19-20.)

However, once the instant dispute arose, Alberto-Culver decided that, rather than litigate in Paris in the mutually chosen forum, it preferred to litigate on its home ground. Accordingly, in patent violation of its contractual obligations, Alberto-Culver commenced this suit. Faced with litigation thousands of miles from his home, Mr. Scherk petitioned the District Court to halt the instant proceed-

* Mr. Scherk is still a German citizen, but in 1969 he became a resident of Switzerland.

ings pending the outcome of arbitration, and he commenced arbitration proceedings in Paris before the ICC. The District Court refused to stay its proceedings and enjoined Mr. Scherk from continuing the arbitration. The District Court should have granted Mr. Scherk's request for a stay.

It is settled national policy, 9 U.S.C. §1 *et seq.*, that arbitration is to be encouraged as a convenient, inexpensive and expeditious way in which to handle litigable disputes between private parties. See, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Arbitration clauses in commercial contracts, such as here, are not merely valid and enforceable, but also irrevocable. 9 U.S.C. §2. Such clauses are to be liberally construed, *Lundgren* v. *Freeman*, 307 F.2d 104, 110 (9th Cir. 1962), and all doubts are to be resolved in favor of arbitration. *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382, 385 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961). The definition of "commerce" in the Federal Arbitration Act includes international commerce. 9 U.S.C. §1.

Significantly, Congress was not satisfied with Chapter One of the Federal Arbitration Act as its sole statement of policy concerning arbitration in international commercial matters. In 1970, having considered the appropriateness of, and the benefits to be gained from, arbitration in the international context, Congress enacted Chapter Two of the Federal Arbitration Act. 9 U.S.C. §201 *et seq.* Chapter Two provides that an international commercial contract providing for arbitration is enforceable and irrevocable. 9 U.S.C. §§202, 208. The courts of the United States are to compel such arbitration proceedings. 9 U.S.C. §§206, 208.

Congress specifically enacted Chapter Two of the Federal Arbitration Act to enable the United States to become a party to the 1958 United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (the "UN Convention"). 9 U.S.C. §201. As its title indicates, the UN Convention is the basis for an international effort to provide enforcement for both international arbitration agreements and awards. (See Articles II and III.) As of December 29, 1970, thirty-seven countries had signed the UN Convention. See [1970] 3 U.S.T. 2561-66.

The arbitration agreements in the case at bar are clearly enforceable by the express language of both Chapter One and Chapter Two of the Federal Arbitration Act and Article II of the UN Convention. The District Court and the Seventh Circuit refused to enforce the unambiguous arbitration agreements in this case solely because of this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953). (See Appendix to Petition for Certiorari,* App. 6-7, 31-32.) In *Wilko*, this Court held that an agreement to arbitrate future disputes was unenforceable when a claim was made under the Securities Act of 1933, 15 U.S.C. §77a *et seq.* (the "1933 Act"), by a customer against a brokerage house. It is the position of the Petitioner that, although *Wilko* is applied to bar arbitration of strictly domestic disputes, *Wilko* need not and should not be applied to international disputes. In view of the expanding scope of the federal securities laws, the application of *Wilko* to international disputes will effectively nullify Chapter Two of the Federal Arbitration Act and frustrate this country's decision to join in the UN Convention. That result is unwarranted, inappropriate and unwise.

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* Abbreviated hereinafter as "Cert. Pet. App."

II.

WILKO DOES NOT PROPERLY APPLY TO THIS CASE AND SHOULD NOT BE EXTENDED TO COVER THIS CASE.

The sole authority for the refusal of courts below to enforce these arbitration agreements is *Wilko* v. *Swan.** In *Wilko*, this Court was interpreting §14 of the 1933 Act, 15 U.S.C. §77n. There a customer of a brokerage house, Hayden, Stone & Co., brought suit under §12(1) and (2) of the 1933 Act, 15 U.S.C. §77*l*, for fraud in the sale of securities to him by Hayden, Stone. The customer had earlier signed a seventeen-page form contract with Hayden, Stone, which contained an arbitration clause along with numerous other provisions which waived protections of the federal securities laws. 201 F.2d at 445. This Court decided that, in controversies under the 1933 Act, agreements to arbitrate future disputes were unenforceable. Since the language of §14 of the 1933 Act is similar to that of §29(a) of the Exchange Act, 15 U.S.C. §29cc(a), courts have selectively applied *Wilko* to Exchange Act cases.**

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* The District Court in *Wilko*, 107 F.Supp. 75 (S.D. N.Y. 1952), was reversed by the Court of Appeals, 201 F.2d 439 (2d Cir. 1953), which in turn was reversed by this Court.

** *Wilko*, however, has not been applied unsparingly or uncritically. Instead, courts have, for the most part, cautiously considered each case and noted distinguishing features in cases which do not square with the rationale behind *Wilko*.

Wilko has been limited to agreements to arbitrate future disputes, leaving parties free to decide to arbitrate existing controversies. *Reader* v. *Hirsch & Co.*, 197 F.Supp. 111 (S.D. N.Y. 1961); *Berens* v. *Bache & Co.*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,387 (S.D. N.Y. 1974). As to disputes between broker-dealers

While the result in *Wilko* may have been appropriate under the facts of that case, there are several significantly different factors in the case at bar which, petitioner submits, are grounds for finding that *Wilko* does not apply to this case and should not be extended to do so.

First: *Wilko* involved a situation where there was considerable disparity in the bargaining power of the respective parties, along with an apparently egregious form contract used by the stronger party. The arbitration agreement as part of this form contract was not the result of individualized bargaining. Here, however, the arbitration agreements were reached through arm's-length bargaining between sophisticated businessmen and lawyers. Alberto-Culver was represented by two American law firms. (A. 38-39.) Detailed contracts for this one occasion were negotiated over a period of several months.* The

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(Footnote continued)

who are members of stock exchanges whose rules provide for arbitration, agreements and exchange rules providing for arbitration have been enforced. *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972). A nonmember can force a member firm to arbitrate. *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971); see also *Financial House, Inc.* v. *Otten*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,395 (E.D. Mich. 1973). Courts have refused to apply *Wilko* when the parties to the agreement to arbitrate are sophisticated businessmen dealing at arm's-length with equal bargaining power. *GCA Corp.* v. *Coler*, [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,339 at 91,815 (S.D. N.Y. 1972); see *Alco Standard Corp.* v. *Benalal*, 345 F.Supp. 14, 24 (E.D. Pa. 1972) (dictum). Courts have even examined the validity of the securities claim presented and, upon finding that the claim is specious or a sham, have enforced arbitration. *Waldman* v. *Shearson, Hammill & Co.*, [Current Binder] CCH Fed. Sec. L. Rep. ¶94,396 (D. N.J. 1974).

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*The contracts are Exhibits 1 to 4 to the Complaint. (Record Document No. 2.)

parties had equal bargaining power. Rather than being confronted with a take-it-or-leave-it, one-sided contract drafted for Mr. Scherk, Alberto-Culver as the buyer protected itself by requiring a host of warranties. *

Some courts would not apply *Wilko* in this situation. *GCA Corp.* v. *Coler,* [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,339 (S.D. N.Y. 1972); *Alco Standard Corp.* v. *Benalal,* 345 F.Supp. 14, 24 (E.D. Pa. 1972) (dictum). As the Court said in *GCA Corp.* v. *Coler*:

> "This court agrees with the contention of GCA that the public policy offended by a brokerage house customer's relinquishment of his right to sue in the courts is not offended by a similar relinquishment made between parties who deal at arm's length from equal bargaining positions." CCH ¶93,339 at 91,815.

Second: In *Wilko,* one of this Court's concerns was, in the words of dissenting Judge Stevens, "that the 1933 Act was intended to give special protection to the relatively uninformed, individual investor." (Cert. Pet. App. 10.) This Court stated in *Wilko* that "[i]ssuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers." 346 U.S. at 435. Here, that is not the situation. Alberto-Culver was well informed on all aspects of this relatively major acquisition. Not only was Alberto-Culver represented in the negotiations by two law firms, but also it had its own accountants, Peat, Marwick & Mitchell, do an independent audit, and it conducted an extensive examination of the businesses, consulting various experts before closing the deal. (A. 31-32, 38-39, 86-89.)

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* The trademark warranties in the FLS contract run for eleven pages, and in the SEV contract for fourteen pages. (Exhibits 1 and 3 to Complaint, Record Document No. 2.)

Third: *Wilko* involved a "garden variety" securities transaction, the customer buying stock from Hayden, Stone. Here, Alberto-Culver was buying three European cosmetic businesses. It acquired the assets of FLS. (A. 4.) SEV was transformed into a stock company by Alberto-Culver's attorneys for Alberto-Culver's tax planning needs. (A. 87-88, 91-92.) Part of the consideration for Mr. Scherk was for deferred payment under some promissory notes. (A. 62-68.) Petitioner does not seek a review by this Court of the lower courts' determination that this case involves securities, although petitioner does not agree with this determination. However, in analyzing the question of whether to enforce or not enforce the arbitration provisions in this case, the form of the transactions should not obscure their substance and economic reality. See *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). As Judge Stevens said, in "negotiated transactions [such as these] the transfer of securities is a function of the form in which the parties elect to cast their transaction. . . ." (Cert. Pet. App. 12.) It is inequitable to permit Alberto-Culver to direct the form of these transactions and then use that form to nullify those contractual commitments which it no longer finds convenient.

Fourth: While §14 of the 1933 Act was read by this Court in *Wilko* to make unenforceable arbitration agreements for future disputes, an interesting difference between the 1933 Act and the Exchange Act provides a reason for not interpreting §29(a) in the same way. Section 14 of the 1933 Act says that one cannot waive one's rights under that Act. 15 U.S.C. §77n. Congress in §12 of the 1933 Act specifically provided for private suits for violations of the 1933 Act, and shifted the burden of proof. The seller of a security is required to prove that "he did not know, and in the exercise of reasonable care could

not have known, of such untruth or omission." 15 U.S.C. §77*l* (2).

Here, Alberto-Culver bases its action upon Rule 10b-5. Congress did not provide a private civil remedy for violation of §10(b) of the Exchange Act or Rule 10b-5. The civil remedy for Rule 10b-5 has been implied by the courts. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971). Thus, while it is reasonable to interpret §14 of the 1933 Act as prohibiting a waiver in advance of a dispute of one's right to go to court, it is also reasonable not to interpret §29(a) of the Exchange Act the same way, particularly when, as here, all of the other policy considerations of *Wilko* are absent.

Consequently, even if this were a strictly domestic situation, which it is not, *Wilko* should not be applied to this case, and the arbitration provisions should be enforced.

III.

IMPORTANT POLICY CONSIDERATIONS DICTATE THAT WILKO SHOULD NOT BE APPLIED TO INTERNATIONAL TRANSACTIONS.

Perhaps the most important distinction between *Wilko* and this case is that *Wilko* was decided solely in a domestic context, whereas the current dispute involved an international commercial transaction. The international nature of this situation and the attendant policy considerations, as enunciated by this Court in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and Judge Stevens in his dissent in this case, are so important that they predominate over all others and compel arbitration here. For as Judge Stevens said, the enforcement of the arbitration agreements in this case will not frustrate

the policies of the Exchange Act, whereas refusal to enforce the arbitration agreements will frustrate the important policies set out in *Zapata*. (Cert. Pet. App. 16, n. 13.)

In *Zapata*, this Court determined that, in *international* commercial matters, agreements as to choice of forum were valid and would be enforced. This Court stated that forum selection clauses:

> "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." (Footnote omitted.) 407 U.S. at 10.

This, the Court noted, is particularly so, when as in the instant case, the agreement is the result of arm's-length bargaining by sophisticated businessmen. Indeed, this Court recognized that such a clause "is an indispensable element in international trade, commerce, and contracting." 407 U.S. at 13-14. Such clauses serve many useful purposes. The parties are able to determine which of the many possible forums to which they are exposed will hear any dispute. Thus, the parties can know in advance where disputes will be heard, what type of tribunal will be used, and what the outlook of that forum may be. The parties may also be able to select a neutral forum, which is mutually satisfactory to each.

In an age of ever-increasing world commerce, the necessity for all countries to enforce forum selection clauses is exceedingly important, and the exceptions to such enforcement should be few, limited, and absolutely necessary. As this Court stated:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our

courts. . . . We cannot make trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts." 407 U.S. at 9.

This Court did say that in particular cases forum selection clauses would not be enforced if a sufficiently strong public policy intervened. Not every domestic public policy consideration, however, will be sufficiently important to justify nonenforcement of a forum selection clause. It is extremely significant that in *Zapata* this Court concluded that the forum selection clause should be enforced even though the selected tribunal would enforce an exculpatory clause for negligence which would not be enforced in the United States because it violated domestic public policy.

Alberto-Culver suggested in the appeal in the Court below that the policies behind *Wilko* and §29(a) of the Exchange Act were sufficiently compelling to justify the nonenforcement of the arbitration agreements in the instant case. Petitioner disagrees. The express language of §29(a) does not require that result. Furthermore, as already discussed, none of the discernible policy bases of *Wilko* are applicable to this dispute. Alberto-Culver did not waive the protection of the Exchange Act. It did, however, knowingly, intelligently and voluntarily agree to arbitrate rather than litigate in the United States.*

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* Alberto-Culver has always premised its argument that the arbitration agreements were not enforceable on the *Wilko* decision. Alberto-Culver has not asserted that it would be unreasonable to enforce the arbitration provisions. Nor has it asserted any fraud in the inducement of the arbitration provisions which would justify non-enforcement of them under *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The exception Alberto-Culver would urge to the general rule seen in *Zapata* would decimate the rule. The only reason the courts below refused to enforce the arbitration agreements here is that Alberto-Culver cloaked a traditional claim for alleged breach of warranties with Rule 10b-5. There can be no question about the fact that there has been a phenomenal growth of securities litigation in the last fifteen years. It is also clear that the term "security" as used in the Exchange Act, 15 U.S.C. §78c(a)(10), has been given an increasingly broad definition, particularly under the catch-all phrase "investment contract." *Tcherepnin* v. *Knight*, 389 U.S. 332, 338 (1967). Thus, "securities" are necessarily present in a great variety and in a vast number of international commercial transactions.* It will take no particular skill to frustrate the intention of the parties to such transactions who adopt forum selection clauses by merely pleading the presence of a securities claim if any dispute should arise.

The exception urged below by Alberto-Culver will not only subvert the *Zapata* rule, but it will also effectively

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*The term "security" for the purposes of the Exchange Act has been found to include the following: withdrawable capital shares in a savings and loan association, *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967); loan participation agreements, *Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (5th Cir. 1969); Scotch whiskey warehouse receipts, *SEC* v. *M. A. Lundy Associates*, 362 F.Supp. 226 (D.R.I. 1973); pyramid sales distribution agreements, *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973), *cert. denied*, ... U.S. ..... (10/9/73); contracts for purchasing and raising beavers, *Continental Marketing Corp.* v. *SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968); purchase of restaurant property, *Huberman* v. *Denny's Restaurants, Inc.*, 337 F. Supp. 1249 (C.D. Calif. 1972); short term promissory notes, *Sanders* v. *John Nuveen & Co.*, 463 F.2d 1075 (7th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972).

nullify Chapter 2 of the Federal Arbitration Act and substantially frustrate this country's participation in the UN Convention. Alberto-Culver is asking for adoption of exactly the parochial concept this Court deplored in *Zapata*—the belief that Americans can go out into world trade and yet insist that all disputes be decided at home under our laws. 407 U.S. at 9. That attitude, if adopted by this Court for the vast array of international securities transactions, is bound to hinder the development of American overseas trade and commerce. As Judge Stevens said:

> "[a]n excessively paternalistic attitude toward American overseas investment will inevitably make American capital less attractive to foreign firms." (Cert. Pet. App. 10.)

Finally, the result reached by the Court of Appeals for the Seventh Circuit adversely affects the credibility of American business and the American judicial system. Simply stated, under its agreements with Mr. Scherk, Alberto-Culver agreed to arbitrate in Paris before the ICC. Now after it raised a dispute with Mr. Scherk with respect to those agreements, Alberto-Culver says that it must be afforded an absolute right to renege on its agreement. Our judicial system should not let sophisticated American businesses go abroad to do business, enter into solemn agreements with foreigners and then break those agreements. Judicial sanction of this sort of arrogant behavior will not only injure the unsuspecting foreigner who contracted in good faith when he finds himself the victim of an idiosyncracy of American law, but also will injure American businessmen wanting to do business with foreigners, who will find themselves heirs to a legacy of distrust.

CONCLUSION

Petitioner respectfully requests this Court to reverse the decisions below denying the stay under 9 U.S.C. §3 and enjoining arbitration, and to remand the case with instructions to enter the stay and compel arbitration.

Dated: March 6, 1974

Respectfully submitted,

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ADDENDUM

The Federal Arbitration Act, 9 U.S.C.

Section 1.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 201.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202.

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 206.

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 208.

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Securities Act of 1933, Section 14

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934, Section 29(a)

Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Add. 4

UNITED NATIONS

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

June 10, 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency

of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.